Supreme Court, U.S.
F I L E D
99 922 OCT 7 1999
OFFICE OF THE CLERK

(2)

No.

CORRECTED COPY

In The

Supreme Court of the United States

IRONWORKERS LOCAL 386,

Petitioner,

vs.

WARSHAWSKY & COMPANY

(NATIONAL LABOR RELATIONS BOARD),

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

PETITION FOR WRIT OF CERTIORARI

TERRANCE B. McGANN
Counsel of Record
TRAVIS J. KETTERMAN
WHITFIELD & GREGORIO
2 North LaSalle Street, Suite 1650
Chicago, Illinois 60602
(312) 251-9700

102 pp

QUESTIONS PRESENTED

1. Does the First Amendment protect a labor organization's right to peacefully distribute handbills to employees of neutral employers in the course of a labor dispute?

2. Is it incumbent upon the Court of Appeals to construe Section 8(b)(4) in order to avoid the denial of a labor organization's right to free expression through the distribution of handbills in the course of a labor dispute?

PARTIES TO THE PROCEEDING

The Petitioner, Ironworkers Local 386, intervened in the underlying case in which Respondent Warshawsky & Company filed a Petition for Review of an Order of the National Labor Relations Board, an additional Respondent to this Writ of Certiorari.

TABLE OF CONTENT

QUESTIONS PRESENTED i

PARTIES TO THE PROCEEDING ii

TABLE OF CONTENT iii

TABLE OF CITATIONS v

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 1

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED 1

STATEMENT OF THE CASE 3

ARGUMENT 7

POINT I.

THE MAJORITY DECISION DIRECTLY AND ADVERSELY ENCROACHES UPON THE CONSTITUTIONALLY AND STATUTORILY PROTECTED RIGHTS OF A LABOR ORGANIZATION AND ITS MEMBERS. 7

POINT II.

THE FACT THAT THE PUBLICITY PROVISO DOES NOT APPLY TO THE UNION'S HANDBILLING ACTIVITY DOES NOT LEAD TO THE CONCLUSION THAT SECTION 8(b)(4) (i) and (ii) HAS BEEN VIOLATED WITHOUT EVIDENCE OF PROSCRIBED CONDUCT. 11

CONCLUSION 18

TABLE OF CITATIONS

Cases

Advice Memorandum in MidAtlantic Restaurants, Inc. (1988 NLRB GCM 165) 14

Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 742-443, 103 S. CT. 2161 (1983) 9

DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, et al ..... *passim*

General Truck Drivers, Warehousemen Local 315 and The Atchison, Topeka and Santa Fe Railway Company, 306 NLRB 616 (1992) 15

Gould Inc. 238 NLRB 618 (1978) 12

Hospital & Service Employees Union, Local 399 v. NLRB, 743 F2d. 1417, 1429 (9th Cir. 1984) 9, 14

Iron Workers Local 386 (Warshawsky & Co.), 325 NLRB No. 141 (May 14, 1998) 5

Madsen v. Women's Health Center, 512 U.S. 753 (1994) 10

NLRB v Retail Store Employees, 447 U.S. 607, 619 (1980) 11

NLRB v Servette, 377 U.S. 46 (1964) 12

NLRB v. Catholic Bishop of Chicago, 440 U.S. 490 (1979) 9

Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577 (1971.) 9

Teamsters Local 82 (Champion Exposition), 292 NLRB 794, 795 (1989) 10

Warshawsky & Company v. National Labor Relations Board (Iron Workers Local 386), 182 F.3d 948 (D.C. Cir. 1999) ..... *passim*

Petitioner Ironworkers Local 386 respectfully requests that a writ of certiorari be issued to review the judgment of the United States Court of Appeals for the District of Columbia Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at Warshawsky & Company v. National Labor Relations Board (Iron Workers Local 386), 182 F.3d 948 (D.C. Cir. 1999)(App. A). The opinion of the National Labor Relations Board is reported in Iron Workers Local 386 (Warshawsky & Company), 325 NLRB No. 141 (1998)(App. B). The opinion of the National Labor Relations Board incorporates the Administrative Law Judge.

STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia ("Court of Appeals") was entered on July 9, 1999.

The jurisdiction of this Court is involved under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in relevant part:

> *Congress shall make no law respecting an establishment of religion, or prohibiting the*

> *free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.*

Section 7 of the National Labor Relations Act states:

> *Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(1)(3) of this title. (July 5, 1935, c. 372 § 7, 49 Stat. 452; June 23, 1947, c. 120, Title I, § 101, 61 Stat 140)*

Section 8(b)(4) of the National Labor Relations Act provides in relevant part:

> *It shall be an unfair labor practice for a labor organization or its agents —*
>
> *(4)(i) to engage in, or to induce or encourage any individual employed by any person engaged in commerce or in an industry affecting commerce to engage in, a strike or a refusal in the course of his employment to use, manufacture, process, transport, or otherwise*

handle or work on any goods, articles, materials, or commodities or to perform any services; or (ii) to threaten, coerce, or restrain any person engaged in commerce or in an industry affecting commerce, where in either case on object thereof is —

(B) forcing or requiring any person to cease using, selling, handling, transportation, or otherwise dealing in the products of any other producer, processor, or manufacturer, or to cease doing business with any other person, or forcing or requiring any other employer to recognize or bargain with a labor organization as the representative of his employees unless such labor organization has been certified as the representative of such employees under the provisions of section 159 of this title: Provided, That nothing contained in this clause (B) shall be construed to make unlawful, where not otherwise unlawful, any primary strike or primary picketing.

STATEMENT OF THE CASE

Over a five-day period in March 1997, the Union distributed handbills at the intersection of Murphy Road and J.C. Whitney Way in LaSalle, Illinois. Immediately adjacent to the intersection, Warshawsky & Company was constructing a warehouse and mail order facility. The Union was engaged in a labor dispute with Automotion, Inc., concerning the payment of substandard wages to its employees. The handbills contained the following messages.

AUTOMATION, INC.
IS DESTROYING
THE STANDARD OF
WAGES FOR
HARD-WORKING
UNION MEMBERS

AUTOMATION, INC.
PAYS SUBSTANDARD
WAGES AND FRINGE BENEFITS

IGNORING THE AREA STANDARDS
THREATENS THE EFFORTS
AND SACRIFICES
OF ALL UNION MEMBERS

IronWorkers Local 386 is currently engaged in labor dispute concerning the failure of Automation, Inc. to pay the area standard wages and fringe benefits. We are appealing only to the general public. We are not seeking any person to cease work or to stop making deliveries.

After the employees of neutral employers refused to work, Warshawsky initiated Unfair Labor Practice charges before the National Labor Relations Board alleging that the that the handbilling activities violated Section 8(b)(4) of the National Labor Relations Act. After the General Counsel issued a complaint against the Union, and the General Counsel, Warshawsky, and the Union entered into a stipulated record. Subsequently, the parties submitted memoranda in support of their positions before Administrative Law Judge William J. Pannier III ("ALJ").

On June 3, 1997, the ALJ issued a decision concluding that the Union's handbilling activities did not violate Section 8(b)(4) and dismissed the Complaint. (Appendix B). The ALJ held that the evidence presented in

the stipulated record failed to show that the employee's failure to perform services had been other than a spontaneous reaction to the Union's lawful actions of publicizing undisputed facts. Furthermore, the ALJ, recognizing the constitution implication of denying peaceful free speech, stated that "the analysis must proceed with care."

On May 14, 1998, the National Labor Relations Board affirmed the ALJ's findings and conclusions and adopted the order dismissing the Complaint. Iron Workers Local 386 (Warshawsky & Co.), 325 NLRB No. 141 (May 14, 1998). Warshawsky filed its appeal before the United States Court of Appeals for the District of Columbia. After all parties submitted briefs, the Appellate Court heard oral argument on February 8, 1999. On July 9, 1999, the Appellate Court issued its divided opinion reversing the holding of the ALJ and the National Labor Relations Board. The Appellate Court was sharply divided on the Union's First Amendment right to communicate its message through peaceful handbilling and upon the broad inferences of fact made by the majority, which are not support by the stipulated record.

The majority opinion of the Appellate Court establishes a very dangerous precedent that is directly at odds with the protection guaranteed by the Constitution and Federal Statutes. This case represents an attack on the very ability of Unions to distribute handbills in the course of a labor dispute. The majority opinion seeks to impute liability on any labor organization that distributes handbills when employees of neutral employers decide to leave the jobsite voluntarily and on their own accord. It must be remembered -- this case contains no facts that the Union encouraged employees to leave a jobsite. This lack of evidence was found by both the ALJ and affirmed by the National Labor Relations Board. Indeed, the Union's handbill expressly stated that the Union was "not seeking any person to cease work or to stop making deliveries." Unlike traditional

handbills distributed in the course of a labor dispute, the current handbill contained no request to boycott the business of neutral employers nor did it reference neutral employers or employees. The record is devoid of any evidence which remotely established that the Union induced or encouraged any employee to engage in a strike, or refuse to perform services. Rather than rely upon the facts, the majority opinion reversed the ruling of the ALJ and the National Labor Relations Board based upon a leap of inference not contained in the record.

Furthermore, the ALJ and the National Labor Relations Board all agree that the activity at issue is simply the distribution of handbills which truthfully advise recipients of the facts about the primary employer's payment of wages and benefits. This factual basis clearly triggers the application of the First Amendment to the United States Constitution, along with the protections of the National Labor Relations Act. While the ALJ, the National Labor Relations Board and dissenting Judge Wald recognized and applied a First Amendment analysis to these facts, the majority opinion simply disregards such analysis concluding that "the First Amendment does not protect communications directed at – and only at – the neutral employees ..." It is with this conclusion, along with the unprecedented inferences of fact, with which we take issue.

We ask this court to reverse the decision of the Court of Appeals and enforce the decision of the National Labor Relations Board.

ARGUMENT

I

THE MAJORITY DECISION DIRECTLY AND ADVERSELY ENCROACHES UPON THE CONSTITUTIONALLY AND STATUTORILY PROTECTED RIGHTS OF A LABOR ORGANIZATION AND ITS MEMBERS.

The sharply divided majority and dissenting opinions clearly reflect conflicting constitutional interpretations surrounding this volatile issue.

Judge Wald, writing in the dissent, states that the majority "writes a suprisingly broad-based opinion which reverses the Board, finds a union in violation of federal labor law, and *sets forth new constitutional law restricting the reach and protection of the First Amendment.*" Warshawsky & Company v. NLRB, 182 F.3d 948, 958 (D.C. Cir. 1999)(emphasis added).

Judge Wald commented further:

> *Surprisingly, the majority seems to be saying that the First Amendment is not implicated at all when a Union communicates solely with neutral employees. There is no support for this belief. The majority jumps from the Supreme Court's holding that the prohibition under section 8(b)(4) of the inducement or encouragement of a secondary work stoppage does not constitute an unconstitutional abridgement of free speech [cite omitted] to its conclusion that any kind of union speech to neutral employees carries no First Amendment protection. This, in my view, puts the cart ahead of the horse.*

Id. at 961.

In DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council, et al. (DeBartolo II), 485 U.S. 568, 578, 108 S.Ct. 1392 (1988), the Supreme Court recognized the constitutional protections accorded to the distribution of handbills to consumers "pressing the benefits of unionism to the community and the dangers of inadequate wages to the economy and the standard of living of the populace."

The Majority Decision took great pains to draw a distinction between consumers with no involvement in the labor dispute and with employees of neutral employers. As Judge Wald correctly points out, this is a fundamentally flawed distinction without any legal basis.

Judge Wald continued:

> *Members of labor organization – even employees of neutral employers – are people too. They also consume. They also may be potential future joint venturers with or employees of the offending company. They certainly are members of their communities with an interest in knowing which employers in the area pay substandard wages.*

Id. at 962. Accordingly, the handbill distributed in the pending case is protected by the guarantees contained in the First Amendment.

The hallmark of a successful labor organization is directly correlated to its ability to represent effectively the interest of its members. The interests of its members are furthered by its ability to communicate with the general public, employers, government and members of other trade organizations. The Majority Decision seeks to deny the Union and its members their fundamental rights protected by

the Constitution, and their Section 7 rights under the National Labor Relations Act, 29 U.S.C. §157.

This court has consistently recognized that peaceful pamphleteering is a form of communication protected by the First Amendment. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419, 91 S.Ct. 1575, 1577 (1971.) In addition, Warshawsky's position has a disparate discriminatory impact upon labor organizations since labor organizations, rather than employers, routinely utilize handbills as a means of communicating its message.

Furthermore, the Majority Decision creates an inherent conflict with Constitutional standards. In NLRB v. Catholic Bishop of Chicago,[1] 440 U.S. 490 (1979), the Supreme Court affirmed the mandate that "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless the construction is plainly contrary to the intent of Congress." Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731, 742-443, 103 S. CT. 2161 (1983)(the Board's interpretation of the Act is untenable in light of First Amendment concerns even though its interpretation is a rational construction of the Act); Hospital & Service Employees Union, Local 399 v. NLRB, 743 F2d. 1417, 1429 (9th Cir. 1984)("if the statutory definition of what constitutes coercion is legitimately open to more than one interpretation, the Board should choose the interpretation that does not create constitutional problems"). The Majority Decision's interpretation does not avoid constitutional issues; it fosters them. Indeed, the Majority

---

[1] The Supreme relied heavily upon its holding in the Catholic Bishops of Chicago case in rendering its opinion in Debartolo II, 485 U.S. 568 (1988). There the court applied its rule of construction upholding the Union's right to peacefully handbill in light of the proscription contained in Section 8(b)(4).

Decision's approach to this case dangerously encroaches upon the statutory and constitutional protections accorded to handbills in DeBartolo II. Conversely, the path chosen by the Labor Board and affirmed by Judge Wall in her dissent is consistent with the Supreme Court mandate which reconciles the Union's fundamental right to free speech.

In a sensitive area such as regulation of speech, the Supreme Court is quite clear that the governing standard for content-neutral speech regulations is that the government's regulation burdens speech no more than is necessary to serve a significant government interest. Madsen v. Women's Health Center, 512 U.S. 753 (1994). In addition, the speech restrictions must be "couched in the narrowest terms that will accomplish its pin-pointed objective." Id. The Majority Decision is neither necessary to serve a significant government interest nor is it narrowly tailored to an extremely targeted goal. Rather, the Majority Decision serves notice to labor organizations that peaceful handbilling is now a restricted activity characterized by increased hazards that a successful handbill is a prohibited handbill. The legality of the message is now determined by the reaction of its recipient rather than upon the message being communicated. As set forth by the Labor Board in this matter, "that some handbill recipients may interpret purely area standards messages as some form of appeal for refusals to perform work is not the determinative consideration." Citing Teamsters Local 82 (Champion Exposition), 292 NLRB 794, 795 (1989)(The subjective interpretation of the message is not the critical consideration). Had the employees chosen to disregard the handbill distributed by the Union, there would be no dispute concerning the Union's right to free expression.

Once again, the Majority Decision in the instant case carries an increased risk of censorship and discriminatory application by unduly restricting a labor organization's right to engage in peaceful handbilling. The policy advanced by

the Majority Decision ignores the long-standing distinction between the conduct associated with picketing and the communication associated with handbilling "which depends entirely on the persuasive force of the idea." Debartolo II, 485 U.S at 580, *quoting* from NLRB v Retail Store Employees, 447 U.S. 607, 619 (1980). The Majority Decision threatens not only the statutory rights of a Union member, it unnecessarily encroaches upon their heavily guarded constitutional rights.

II.

THE FACT THAT THE PUBLICITY PROVISO DOES NOT APPLY TO THE UNION'S HANDBILLING ACTIVITY DOES NOT LEAD TO THE CONCLUSION THAT SECTION 8(b)(4)(i) and (ii) HAS BEEN VIOLATED WITHOUT EVIDENCE OF PROSCRIBED CONDUCT.

Under the analysis set forth in the underlying Majority Decision, if a union's handbilling activities are not protected by the Publicity Proviso, they are in violation of Section 8(b)(4)(i) and (ii).

The fact that the union's handbilling activities have resulted in individuals ceasing the performance of work does not lead to the unwarranted conclusion that its activities "automatically" violated the provisions of Section 8(b)(4). As set forth by Judge Pannier:

> "To establish a violation of that Section of the Act, there must be evidence showing, or from which it can be inferred, both that a respondent engaged in unlawful conduct, within the meaning of Section 8(b)(4)(i) or (ii) and; second, evidence showing, or from which it can be inferred, that such conduct had

> the object proscribed by Section 8(b)(4)(B) of the Act. That is, a preponderance of the evidence must establish both unlawful conduct and unlawful action."

(Emphasis added.)

Warshawsky maintains that this analysis under Section 8(b)(4) should not be undertaken but assumed where the Publicity Proviso does not protect the handbilling activity. Since the Appellate Court could not delineate any facts to support its decision, it has adopted the untenable position set forth by Warshawsky. The Union takes issue with this unprecedented proposition.

The ALJ and the Labor Board correctly found that the Publicity Proviso to Section 8(b)(4) did not apply to this dispute. This finding is supported by the fact that the handbilling did have the effect of causing a work stoppage and because the handbill did not publicize the distribution of a product produced by the primary employer. NLRB v Servette, 377 U.S. 46 (1964). However, contrary to the position espoused by Warshawsky, the fact that the Publicity Proviso is inapplicable to the facts of the dispute does not lead to the conclusion that the communication is automatically in violation of the provisions of Section 8(b)(4).

Even where a work stoppage takes place, the Board will not presume that the Union has acted unlawfully. Gould Inc. 238 NLRB 618 (1978), *enf'd* 638 F2d. 159 (10th Cir. 1980). The Union never requested that anyone cease using or purchasing a product nor, by its express terms, did the Union request individuals to cease working.

Judge Pannier correctly found that while the decisions in DeBartolo I and DeBartolo II are not dispositive of the ultimate issues, the cases are instructive. The Supreme Court's decision in DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council (DeBartolo

II), 485 U.S. 568, 108 S.Ct. 1392 (1988) supports the Union's position concerning the Publicity Proviso and the Labor Board's inquiry. In DeBartolo II, after remand, the Labor Board held that the Union handbilling at the entrance to a mall urging customers not to patronize any of the mall's shops violated Section 8(b)(4)(ii)(B). The Court of Appeals denied enforcement of the Board's order, finding that neither the legislative history nor congressional intent supported a proscription of such handbilling. Id. at 568. The Supreme Court affirmed the Circuit Court's ruling denying enforcement of the Board's order. Id. at 568.

Justice White authored the opinion for the court majority and stated the following with respect to the Publicity Proviso:

> "The proviso need not be treated as establishing an exception to an otherwise all encompassing prohibition on publicity, but may more reasonably be read as providing protection for a type of communication that might otherwise be considered coercive, even though other forms of publicity would not be so considered. Nor does the legislative history contain any clear indication that Congress intended §8(b)(4)(ii) to proscribe peaceful handbilling, unaccompanied by picketing, urging a consumer boycott of a neutral employer."

Id. 578-588. As noted by Judge Pannier, this quotation is important for our purposes because the Publicity Proviso is not an exception to the general proscription of activities under 8(b)(4) nor should the analysis of 8(b)(4) be avoided when evaluating allegations of secondary activity in the context of handbilling. The result is that the proscription under the 8(b)(4) analysis must also consider the publicity of disputes which is directed to members of a labor organization. As noted by Judge Pannier, "Congress did

include 'members of a labor organization' within the scope of the Publicity Proviso's exclusion of publicity advising the public." The conclusion is inescapable, "the fact that Respondent distributed handbills to members of other labor organizations does not standing by itself, necessarily establish that Respondent had engaged in unlawful inducement or encouragement." [emphasis added]. The Judge and the Labor Board correctly determined that the fact that Union's activities were not protected by the Publicity Proviso, by itself, does not result in some automatic violation. As the Judge reasoned, "more" is needed.

The Supreme Court went further in its analysis of the Publicity Proviso and stated that "It [8(b) language] may indicate only that without the proviso, the particular non-picketing communication the proviso protects might have been considered to be coercive, even if other forms of publicity would not be," DeBartolo II at 580, 1400. Again, this interpretation clearly contemplates applying 8(b)(4) in circumstances where the conduct falls outside of the protection of the proviso. General Counsel for the NLRB, Harold J. Datz, in the Advice Memorandum in MidAtlantic Restaurants, Inc. (1988 NLRB GCM 165) cited the Supreme Court's decision in DeBartolo II as follows: "The Court also concluded that the fact that the handbilling was outside the protection of the Publicity Proviso did not mean that the appeals must be considered restraint or coercion within the meaning of Section 8(b)(4)(ii)."

In Hospital & Service Employees Union, Local 399 v. NLRB and Delta Airlines, Inc., 743 F.2d. 1417 (9th Cir. 1984) the Ninth Circuit Court of Appeals scrutinized four different handbills distributed by the petitioning union. The Court agreed with the Board that each of the handbills were outside the protection of the Publicity Proviso. However, the Court remanded the matter back to the Board to address the statutory issue of whether the provisions of Section 8(b)(4) were violated by the union and whether the union's conduct

in disseminating the handbills rose to the level of coercion. Id. at 1424. The Court's decision in Delta Air supports the Union's current position that it is incumbent upon the Labor Board to apply the statutory 8(b)(4) analysis to the Union's activities. Warshawsky maintains that such violation is derived from the lack of protection of the Publicity Proviso.

The Labor Board held in General Truck Drivers, Warehousemen Local 315 and The Atchison, Topeka and Santa Fe Railway Company, 306 NLRB 616 (1992), that both the Union's picketing and handbilling violated Section 8(b)(4). The facts in the Santa Fe case are clearly distinguishable from those in the current dispute; however, the decision is significant from the standpoint of the Labor Board's analysis of the Union's handbilling activities. The Labor Board rejected the Union's contention that its handbilling activities were protected by the Publicity Proviso since the handbills had the effect of inducting the employees of neutrals to refuse to perform work. Id. at 631. Rather than conclude that the Union violated 8(b)(4), the Labor Board engaged in an independent analysis to determine whether the unprotected handbilling activities also violated the provisions of Sections 8(b)(4).

The decisions rendered in DeBartolo II, Delta Airlines, and Santa Fe support the Union's position that the finding that the Union's activities falls outside the scope of the Publicity Proviso does not lead to the untenable conclusion that such activities are therefore in violation of Section 8(b)(4). As the Court instructed in Delta Airlines and as the Board proceeded upon in Santa Fe, once it is established that a union's handbilling activities are unprotected by the Publicity Proviso, the Labor Board must look to the facts and circumstances to determine whether the provisions under 8(b)(4) have been violated. It is under this necessary analysis that Warshawsky's claim must fail.

The ALJ proceeded to note that the "Publicity Proviso is an express 'clarification' by Congress of the reach

of Section 8(b)(4)'s prohibitions, rather than being an exception to those prohibitions." This is a crucial point that was brought out in the Petitioner's original "Statement and Memorandum" and relied upon by Judge Pannier as follows:

> "First, the fact that the proviso is an express "clarification," rather than an exception, is some indication that Congress contemplated other, unstated, clarifications which would inform resolution of issues arising under Section 8(b)(4) of the Act's stated prohibitions. Second, such unstated clarifications arise in the context of the publicity proviso's above-quoted definition of "the public" which embraces both "consumers and members of a labor organization[.]" Inasmuch as the proviso serves as a clarification, rather than an exception, the reach of the prohibition which it interprets, explains and clarifies must, of necessity, take into account publicity of disputes which is directed to members of labor organizations, without too readily concluding that such publicity constitutes unlawful inducement of encouragement."

(Appendix B)

> "...The language is sufficiently broad to allow the clarification to reach publicity directed to members of any labor organization or organizations. Consequently, the fact that Respondent distributed handbills to members of other labor organizations does not, standing by itself, necessarily establish that Respondent had engaged in unlawful (i) inducement or encouragement."

(Appendix B)

Disregarding the findings of fact of the ALJ and the Labor Board, the Court of Appeals found that the Union sought to induce the neutral employees to cease performing work. This finding was inferred by the language contained on the handbill (e.g. "Ignoring the Area Standards threatens the efforts and sacrifices of all Union members"), that the handbill was directed at neutral employees, and "brief" conversations between handbillers and recipients to which the stipulated record recites "there is no evidence that reflects the content of these conversations". (Appendix B)[2] Based upon these inferences, the Court of Appeals now denies the right of free expression to all labor organizations who distribute handbills to neutral employees who subsequently, for whatever reason, chose not to work. As set forth by the ALJ and the Labor Board, "more" is needed to encroach upon the fundamental right of free speech.

---

[2] The Court of Appeal neglected to infer the reasons that Warshawsky chose not to proceed to a hearing before the ALJ and elicit testimony concerning the content of these brief conversations.

CONCLUSION

For the reasons enunciated above, the Union respectfully requests that this Honorable Court grant this Petition of Writ of Certiorari.

Dated: October 5, 1999

Respectfully submitted,

WHITFIELD & GREGORIO

By: _____
TERRANCE B. McGANN

Terrance B. McGann
Travis J. Ketterman
Attorneys for the Intervenor
2 North LaSalle Street
Suite 1650
Chicago, Illinois 60602
(312) 251-9700